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Implementation of the Principle of Complementarity in Light of the Practice and Historical Background of the International Criminal Court

1. Mohammad. Zamani [1] : Department of Law, Ard.C., Islamic Azad University, Ardabil, Iran
2. Maryam. Seyed Hatami [2*]: Department of Law, Ard.C., Islamic Azad University, Ardabil, Iran
3. Abbas. Salmanpour [3]: Department of Law, University of Guilan, Rasht, Iran

*corresponding author's email: maryamseyedhatami@iau.ir

ABSTRACT

The present article examines the implementation of the principle of complementarity in the International Criminal Court (ICC), with a particular focus on its jurisprudential practice and historical development. Complementarity is one of the emerging concepts in international law that, alongside ensuring the effective functioning of the Court, also recognizes and preserves the independence and sovereignty of states. This principle is designed in such a manner that the Court may exercise its jurisdiction only when states are unable or unwilling to conduct genuine investigations or prosecutions. By clarifying the procedural mechanisms related to the initiation of investigations, the referral mechanisms to the Court, and the role of the United Nations Security Council in this regard, the article demonstrates that the International Criminal Court, through its supervisory systems and procedural regulations, seeks to establish a balance between international considerations and the preservation of national sovereignty. This research, conducted using a descriptive–analytical method, analyzes situations such as Uganda and Darfur to explain how the Prosecutor of the Court determines admissibility and exercises prosecutorial discretion, and also highlights the role of the Security Council and its limitations in referring cases. The findings indicate that although Security Council referrals and other legal mechanisms are effective in advancing international criminal justice, the importance of respecting the principles of national sovereignty and ensuring state cooperation within the international legal system remains evident.

Keywords: *Complementarity, International Criminal Court, Judicial Practice.*

Introduction

In explaining the importance of the implementation of rights, leading scholars of criminal procedure have extensively addressed this issue in their works; however, it remains necessary to reiterate that the actual effectiveness and practical realization of rights recognized in substantive legal provisions depend entirely on procedural regulations. Within the framework of the Statute of the International Criminal Court, all emphasis and insistence on the necessity of ending impunity for international criminals while simultaneously preserving the independence and national sovereignty of states may lose their practical effect if not properly reflected in the manner in which the Court exercises its role—particularly when such intervention is triggered by the inability or unwillingness of domestic authorities. Bringing perpetrators of international crimes before justice requires the existence of precise and well-defined procedural rules. The Prosecutor must possess reliable and accurate tools to determine in which situations national authorities have deviated from genuine proceedings. Furthermore, the rules governing challenges to jurisdiction and admissibility, prosecutorial discretion, and the related decision-making process must be clear and comprehensive. Since the Statute was drafted in a manner intended to secure the consent of states, its procedural provisions—particularly those relating to the principle of complementarity—are highly complex. Moreover, this principle itself represents a relatively recent development in international criminal law. The principle of complementarity functions both as a mechanism to ensure the effective operation of the International Criminal Court and as a safeguard for national sovereignty (1). This dual consideration is reflected more prominently in procedural provisions than in substantive law and has resulted in the creation of numerous procedural rules in this area (2).

The second part of this research examines the approach adopted by the Court and its officials in addressing international crimes committed within the territories of sovereign states. The implementation of complementarity is analyzed in two stages. The first concerns the initiation of investigations by the competent authority, which constitutes the public authority responsible for examining violations of law. The second stage addresses the decision to prosecute and the methods of investigation. The first section focuses on the procedural framework governing the initiation of prosecutions, while the second examines investigative procedures and the manner in which judicial authorities act to implement the principle of complementarity. The conclusion of this phase is marked by the finalization of the decision to bring the matter before the International Criminal Court. General procedural considerations concerning state sovereignty have been formulated with the objective of respecting state sovereignty and encouraging states to join the Court. During the drafting of the Rome Statute, its framers structured the procedural system in such a way as to prevent the Court from interfering in genuine national judicial proceedings. The underlying assumption of the Statute is that national authorities genuinely intend to prosecute and punish perpetrators of international crimes. Therefore, the Court does not possess priority in exercising jurisdiction unless this presumption is rebutted. Whenever the Prosecutor intends to initiate an investigation, the state concerned must be notified at the earliest stage of the proceedings. States must be given the opportunity, first, to demonstrate that they are conducting investigations themselves and, second, to defend the genuineness of their proceedings. Additionally, they must be able to challenge the admissibility of the case before the competent judicial body. Furthermore, the Court's procedural framework and adjudicative mechanisms must be clearly defined, and an oversight mechanism must exist to supervise the Prosecutor's actions and review decisions related to investigation and prosecution.

Initiation of Investigation

Mechanisms for Initiating Investigation

Just as in domestic criminal procedure, where the initiation of investigations may occur through a victim's complaint, a criminal report submitted by individuals, or information obtained directly by the Prosecutor followed by investigative action, the same principle applies in international criminal proceedings. Article 13 of the Rome Statute enumerates the situations in which the Court may exercise jurisdiction, as follows:

(a) A State Party may refer to the Prosecutor, pursuant to Article 14, a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed.

(b) The United Nations Security Council, acting under Article 14, may refer to the Prosecutor a situation in which one or more such crimes appear to have been committed (3, 4).

(c) The Prosecutor may initiate an investigation proprio motu pursuant to Article 15 in respect of such crimes (5, 6).

Initiation of Investigations Proprio Motu by the Prosecutor

One of the defining characteristics of the procedural system of the International Criminal Court is the separation between the investigative and trial phases. Accordingly, all actions undertaken to prepare a case for a precise, effective, and fair trial are conducted within the Office of the Prosecutor and under the Prosecutor's authority and supervision. Within the ICC system, there is no mechanism for the direct referral of cases to the Court without prosecutorial involvement, and therefore the Prosecutor's role in deciding whether to initiate prosecutions and in managing matters within the Court's jurisdiction is of critical importance (7, 8).

Under Article 13(c) of the Rome Statute, one of the mechanisms for triggering the Court's jurisdiction is the Prosecutor's own initiative (proprio motu), exercised by virtue of the Prosecutor's official authority (ex officio). Pursuant to Article 15, the Prosecutor may initiate investigations on his or her own initiative based on information obtained from individuals, organizations, or other reliable sources. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she must submit a request to the Pre-Trial Chamber, accompanied by all supporting documentation and evidence collected, in order to obtain authorization to commence the investigation (5, 6, 9).

Procedure for Investigations Initiated Proprio Motu by the Prosecutor

The mechanism governing the initiation of investigations proprio motu by the Prosecutor, as well as the manner in which such investigations are organized and structured, is set forth in Article 15 of the Rome Statute. First, the Prosecutor may initiate investigations on the basis of information received from a wide range of sources, including regional or international media, governmental and intergovernmental organizations, as well as non-governmental organizations, concerning crimes falling within the jurisdiction of the Court. The second step, pursuant to Article 15(2), involves the verification and evaluation of the credibility of the information received. In this stage, the Prosecutor assesses the seriousness, reliability, and probative value of the information. For this purpose, the Prosecutor may request supplementary information from states, organs of the United Nations, intergovernmental or non-governmental organizations, or any other reliable sources deemed appropriate. Additionally, the Prosecutor may receive written or oral testimony at the seat of the Court (5, 6).

At this stage, the Prosecutor must determine whether there exists a reasonable basis to proceed with further investigation. If, following preliminary examination, the Prosecutor concludes that the information obtained does not provide a reasonable basis for a full investigation, he or she shall notify those who provided the information accordingly. However, the absence of a reasonable basis at this stage does not prevent the Prosecutor from reconsidering the matter in light of new facts or evidence that may later justify broader investigative action (9).

Conversely, if the Prosecutor concludes that a reasonable basis exists for proceeding with an investigation, he or she shall submit the collected evidence and supporting materials to the Pre-Trial Chamber in order to obtain judicial authorization to commence the investigation. The Pre-Trial Chamber, in reviewing the Prosecutor's request, evaluates the legal and factual basis of the proposed investigation and considers whether the situation falls within the Court's jurisdiction, as well as whether national authorities are unable or unwilling to exercise their jurisdiction effectively. This procedural requirement reflects the fundamental relationship between state responsibility and international criminal accountability, ensuring that international intervention occurs only when states fail to fulfill their obligations to investigate and prosecute international crimes (10).

At this stage, special procedural rights are granted to victims. For the first time in the system of international criminal justice, victims are permitted to present their views and concerns directly before the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence. This innovation represents a significant development in international criminal procedure, strengthening the participatory role of victims and enhancing the legitimacy and transparency of proceedings (9). If the Pre-Trial Chamber, upon examining the Prosecutor's request and supporting materials, determines that there is a reasonable basis to proceed and that the matter appears to fall within the jurisdiction of the Court, it authorizes the initiation of the investigation. Such authorization, however, does not constitute a definitive determination regarding jurisdiction or admissibility, as these matters may be subject to further judicial review at later stages of the proceedings (6).

At the same time, if the Pre-Trial Chamber, contrary to the Prosecutor's assessment, concludes that the available evidence does not establish a reasonable basis for investigation and therefore refuses authorization, such refusal does not preclude the Prosecutor from submitting a subsequent request based on new facts or evidence concerning the same situation (5). As is evident from the express provisions of the Statute, the initiation of investigations by the Prosecutor depends on the existence of a "reasonable basis." This threshold, however, must be understood in its proper procedural context. At the preliminary stage, when the Prosecutor is merely determining whether to initiate an investigation, substantial evidentiary material may not yet be available, and therefore the evidentiary threshold cannot be expected to be particularly high (8). The evidence presented to the Pre-Trial Chamber for authorization of investigation cannot be equated, in terms of evidentiary weight or probative value, with the more substantial evidence required later to establish admissibility or confirm charges. Rather, the concept of a "reasonable basis" at this stage refers to the existence of objective indicators sufficient to justify further investigative action and to suggest that crimes within the jurisdiction of the Court may have been committed, consistent with the Court's mandate to combat impunity while respecting national sovereignty (6, 11).

According to internal procedures established by the Office of the Prosecutor, situations falling under Article 15(1) undergo three stages of assessment within the Prosecutor's Office. In the first stage, a preliminary examination is conducted to assess the seriousness and credibility of communications received. In the second stage, the Office conducts a more detailed examination of the factual allegations, including preliminary assessment of jurisdiction and admissibility. In the third stage, a comprehensive legal and factual analysis is undertaken, and a determination is made as to whether there exists a reasonable basis to initiate formal investigation and judicial proceedings (5).

Practical Jurisprudence of the Court

The first situation in which the Prosecutor initiated a preliminary examination proprio motu occurred in 2006 and concerned the situation in Colombia; these preliminary examinations remain ongoing. The situation in Kenya constitutes another significant example of investigations initiated proprio motu by the Prosecutor following the receipt of information regarding crimes allegedly committed in the aftermath of the December 2007 and January 2008 elections. The Prosecutor commenced preliminary examination of this situation in February 2008 (5).

On July 9, 2009, the Panel of Eminent African Personalities, chaired by Kofi Annan, confidentially transmitted to the Office of the Prosecutor the names of individuals believed to be responsible for crimes committed during the post-election violence. Subsequently, on November 5, the Prosecutor informed President Kibaki and Prime Minister Odinga that crimes against humanity appeared to have been committed and emphasized that if national authorities failed to conduct genuine proceedings, the Prosecutor would exercise his authority to initiate investigations in accordance with the Statute. Both officials pledged cooperation with the Court. This process reflects the operational application of the complementarity principle, whereby international jurisdiction is exercised only when national authorities fail to act effectively (6, 9).

It should be noted that during the negotiations leading to the establishment of the Court, states were reluctant to grant the Prosecutor broad discretionary powers comparable to those exercised by domestic prosecutors. Instead, they sought to ensure that prosecutorial authority would be subject to judicial oversight. The requirement that the Prosecutor obtain authorization from the Pre-Trial Chamber constitutes an essential mechanism of judicial control, designed to prevent arbitrary or politically motivated prosecutions and to preserve the sovereignty of states (7, 12). This early judicial supervision by the Pre-Trial Chamber serves as an important safeguard, ensuring that the Prosecutor's authority is exercised in accordance with legal standards and consistent with the principle of complementarity, which prioritizes national jurisdiction while permitting international intervention where necessary (9).

It is also noteworthy that in domestic legal systems, particularly in jurisdictions where prosecutorial authorities operate independently of the judiciary, prosecutors generally do not require judicial authorization to initiate investigations, except in cases involving coercive measures such as arrest, detention, or seizure of property. In contrast, the procedural framework of the International Criminal Court imposes additional safeguards to ensure that prosecutorial discretion is exercised in a manner consistent with international legal principles and respect for state sovereignty (2, 7).

Referral by States

States that accede to the Court's Statute may also refer to the Court situations in which, in their view, one or more crimes falling within the Court's jurisdiction appear to have been committed. Depending on the circumstances, the states concerned may waive their primary jurisdiction and submit a self-referral, thereby entrusting to the Court the examination of a situation that would ordinarily fall within the referring state's jurisdiction, typically on the ground of inability (9). Alternatively, much like the function of official authorities in domestic criminal proceedings as crime reporters, they may transmit alleged violations of the Statute to the Prosecutor of the Court.

Procedure for the Referral of a Situation by States

Pursuant to Article 12(2), read together with Article 13(a) and taking into account Article 12(3), states that have joined the International Criminal Court in accordance with their constitutional requirements may refer to the Prosecutor situations indicating the commission of crimes within the scope of Article 5 of the Statute. States that are not parties to the Statute may likewise accept the Court's jurisdiction over a specific crime by lodging a declaration with the Registrar. The accepting state is then obliged, under Part 9, to cooperate with the Court without delay or exception. A non-party state that files such a declaration may limit its acceptance to a particular situation or case and is not required to accept the Court's jurisdiction in general (7).

A referral by the very state confronting a grave situation is of particular significance from the Prosecutor's perspective. In such cases, the state, by acknowledging its inability to address international crimes committed within its territory, will naturally be more inclined to cooperate effectively with the Court and other actors involved in the administration of international criminal justice; at the same time, the allegation of unwillingness to conduct genuine proceedings is less readily directed against that state. In the years following the commencement of the Court's operations, the Prosecutor's efforts to encourage states to make self-referrals have been regarded as a central policy orientation, to the extent that a range of policy innovations and approaches have been developed in this regard.

The Pre-Trial Chamber has considered a state-party self-referral, in comparison with other triggering mechanisms for the initiation of proceedings before the Court, to be more consistent with the ultimate purpose and legislative rationale of the complementarity principle (6). The Prosecutor has likewise emphasized that complementarity reflects the explicit intention of states to establish a global institution while underscoring the primary duty of states to exercise criminal jurisdiction; this design was also presented as a prudent arrangement that could enhance the effectiveness and impact of the Court, given that states hold undeniable advantages in the collection of evidence and the hearing of witnesses (5). Moreover, when the Prosecutor receives a request for intervention from the state on whose territory the crimes occurred, an additional advantage arises insofar as the Prosecutor may benefit from that state's political commitment to cooperation with the Court and to the conduct of thorough investigations (11).

In 2003, the Office of the Prosecutor convened a meeting entitled "Complementarity in Practice" with the purpose of identifying the capacities for cooperation between domestic authorities and the Court. In that context, a number of specialized terms entered the ICC complementarity vocabulary, including "dialogue with the state," "burden sharing," and "constructive complementarity," all of which relate to the structuring and management of the Court's relationship with states (5, 11).

The Subject Matter Referred to the Court

With respect to state referrals, an important question arises: must a referral to the Prosecutor be framed as a referral of a "situation," or may it be framed as a referral of a "case"? Proponents of "situation" referrals, rather than "case" referrals, emphasized the need to preserve the Prosecutor's evaluative authority and institutional independence—namely, to ensure that the Prosecutor can exercise discretion in deciding whether to prosecute and maintain sufficient autonomy. Supporters of this approach also referred to the practice of the ad hoc tribunals for the former Yugoslavia and Rwanda, where the Prosecutor was able to monitor a situation and open cases against specific individuals. Accordingly, it is clear that states may not adopt a selective approach to justice by referring only particular individuals; instead, they must refer the situation as such. It is then for the Prosecutor to select, from among multiple perpetrators, those most responsible and, applying the criteria set out in the Statute, determine the appropriateness of proceeding in each case.

Practical Practice of the Court

Uganda was the first state that, in what is often characterized as a bold step, referred its own situation to the Court. On December 23, 2003, Uganda declared that it was unable to arrest those responsible and requested the Court to investigate crimes attributed to the Lord's Resistance Army in the northern regions of the country. It is asserted that, since 2008, this armed group has killed more than 1,250 people in Sudan alone, abducted more than 2,000 individuals, and forcibly displaced more than 300,000 from their homes. Over the past year, more than 80,000 people were reportedly displaced and 250 individuals in South Sudan and the Central African Republic were killed by the group.

Following the request for the Court's involvement made by the President of Uganda, negotiations were conducted to enhance effective action against perpetrators and to secure international cooperation. After concluding that a reasonable basis existed to investigate the crimes allegedly committed in Uganda, the Prosecutor transmitted a notification of the intention to exercise jurisdiction to states parties to the Statute and to certain other states. Uganda, which had joined the Court after the Statute entered into force, also issued a separate declaration accepting the Court's jurisdiction from the Court's inception and emphasizing its serious commitment to combating impunity. For the first time in the Court's history, arrest warrants were issued against five individuals in connection with the Uganda situation—senior commanders of the Lord's Resistance Army—including Joseph Kony, Vincent Otti (who is reported to have been killed in 2007 on Kony's orders), Okot Odhiambo, Raska Lukwiya (reported killed on August 12, 2006, leading to the withdrawal of the warrant), and Dominic Ongwen.

On April 5, 2009, at a meeting held in anticipation of the Court's Review Conference with the participation of non-governmental organizations and human rights activists, as well as the global coalition for the Court and the "No Peace Without Justice" organization, the Court's role in Uganda was assessed. At that meeting, Freda Apio, the coordinator of the Uganda coalition, stated that the Court's role in Uganda had been highly significant and that people could now sleep peacefully at night.

The Democratic Republic of the Congo also referred, on May 3, 2004, the situation concerning crimes allegedly committed in part of its territory to the Court. The Congolese declaration did not specify whether the referral was based on inability or unwillingness. Nevertheless, in July 2004, the Prosecutor stated that the situation in Ituri was a priority and that measures taken in that regard would proceed under Article 15, namely investigation and prosecution initiated proprio motu—an assertion that does not appear accurate given that the matter had been referred by the state.

A notable development in the Court's handling of the Ituri situation—representing a concrete example of potential tension between domestic and international jurisdictions—was the prosecution of Thomas Lubanga and the issuance of an ICC arrest warrant against him. Lubanga had already been arrested under a domestic judicial warrant and was being held in a state prison awaiting trial. The ICC Prosecutor transferred him to The Hague, charging him with the war crime of conscripting and enlisting children and using them in hostilities, an offense that was asserted to lack a legal basis in the domestic Congolese framework as presented in the text. His charges were confirmed by the Court in January 2007.

The most recent self-referral to the Court, as of that time, was made by the Central African Republic on December 21, 2004. It should be noted that, upon careful examination of the situations in the Congo and Uganda, it is difficult—within the strict meaning of Article 17 of the Statute—to claim that Uganda was unwilling to prosecute or that the

Congo was unable to administer justice. Rather, the Prosecutor's approach appears to have been, in practice, to utilize the opportunity to play an active role in the sphere of international criminal justice in those contexts (6).

The Specific Situation of Gaza

The situation of Palestine, which emerged following the commission of crimes in Gaza, constitutes one of the most significant current matters before the Court. On January 21, 2009, Ali Khashan, the Minister of Justice of the Palestinian National Authority, appeared at the Court's seat in The Hague and, invoking paragraph 3 of Article 12 of the Rome Statute, proceeded to lodge a declaration accepting the Court's jurisdiction. Two hundred non-governmental organizations also submitted reports concerning crimes committed by the Israeli occupying regime in Gaza, and the Office of Prosecutor Ocampo ultimately announced that it would pursue these crimes; at the same time, however, it referred to the Court's jurisdictional difficulties in addressing the crimes allegedly committed in Gaza. These difficulties were understood to mean that initiating investigations into crimes committed by Zionists in Gaza was not feasible. Among the asserted objections was the fact that the regime in question was not a member of the International Criminal Court; accordingly, absent a referral of the situation by the Security Council, the Court could not pursue the matter. Nevertheless, the Prosecutor promised to begin an examination of the issue immediately. The Office of the Prosecutor was awaiting receipt of a comprehensive report from the Palestinian national authority in late June of that year, and it was also interested in receiving reports from other informed sources. The Office of the Prosecutor might also request supplementary information in order to clarify certain unresolved issues. To facilitate the process, the Office of the Prosecutor intended to hold meetings with the participation of the relevant parties in the coming months. The Office of the Prosecutor guaranteed a fair process for the participation of all parties involved in the matter; however, prior to reaching the merits, the Prosecution—and potentially the Pre-Trial Chamber—had to reach conclusions regarding the answers to certain legal questions.

These questions are as follows:

1- Can the Palestinian National Authority be considered a state? The Palestinian Authority is not a member of the United Nations and holds only observer status, similar to the Vatican. To date, approximately 143 UN member states have recognized it as a state and have established political relations with it. Norway, Spain, and Ireland were among the latest states to announce, on May 22, 2024, that they recognize the Palestinian National Authority. Moreover, Palestine is a permanent and full member of certain international and regional organizations, such as the Arab League. Nevertheless, a portion of UN member states—including many current parties to the Statute—have not recognized the Palestinian National Authority. The question therefore is whether, under contemporary criteria of international law, the Palestinian National Authority can be considered a state in the sense required by Article 12 of the Rome Statute.

2- If it is accepted that the Palestinian National Authority is a state with sufficient capacity to accept the Court's jurisdiction, how is its territory to be determined? Can the territories occupied after 1948 or 1967 also be considered part of the territory of that state, such that prosecution of crimes committed in those areas may be sought? Although, in the context of state formation, having clearly defined borders has not always been treated as a necessary condition—as was the case in the recognition of Albania—state practice has established that possessing fixed borders is not a condition for statehood, and that the existence of territory is sufficient, while boundary treaties are a matter for neighboring states rather than for the recognizing state. However, this issue is of importance for the exercise of the Court's territorial jurisdiction.

3- In light of the disagreements between Hamas and Fatah, is Gaza considered part of the territories under the sovereignty of the State of Palestine?

In this regard, several opinions have thus far been submitted to the Office of the Prosecutor, which are briefly analyzed below. In interpreting Article 12(3), teleological approaches maintain that the term “state” must be interpreted in light of the Statute as a whole and its ultimate object and purpose. On this basis, it is argued that in public international law the word “state” has multiple definitions and lacks a single fixed or ordinary meaning. Accordingly, the term should be assessed within the framework of the Statute’s object and purpose, and the Court should interpret Article 12(3) in a manner that leads to the greatest realization of the Statute’s objectives.

Another arguable view is that, under the rules of treaty interpretation, the expressions used in Article 12(3) clearly limit acceptance of the Court’s jurisdiction to “states” in the ordinary meaning of the term. These approaches assert that the Statute provides no special meaning for the word “state,” and therefore the conclusion that Article 12(3) encompasses entities that do not qualify as states under public international law lacks any foundation.

Relying on the above teleological approach, a branch of the opinions submitted to the Prosecutor’s Office supports the view that, under Article 12(3), the Court need not determine whether the entity issuing the declaration is a state; rather, it must examine whether the entity itself possesses criminal jurisdiction such that it can transfer or delegate that jurisdiction to the Court. Some argue that the Palestinian National Authority possesses an inherent right to exercise criminal jurisdiction within its territory, derived from the right of self-determination as well as from its practical exercise of authority. It has been argued that this point was also emphasized in the Oslo Accords, because in those instruments Palestinian officials agreed, temporarily and voluntarily, to refrain from exercising their criminal jurisdiction over nationals of the Israeli regime. However, according to another argument, the Oslo Accords expressly provide that all powers and responsibilities not explicitly transferred to the Palestinians remain with the Israeli regime, including criminal jurisdiction over its nationals; moreover, responsibilities relating to internal security and public order in the West Bank and Gaza do not lie with the Palestinian National Authority. Therefore, Palestinian officials cannot delegate to the Court a jurisdiction that, under the Oslo Accords, they do not possess.

Some of the opinions received by the Prosecutor’s Office have examined the Palestinian declaration through the lens of state recognition and the traditional criteria of statehood set out in the 1933 Montevideo Convention—namely, a permanent population, a defined territory, government, and capacity to enter into relations with other states—offering different approaches in this regard. The divergence among these views relates primarily to the interpretation of the Montevideo criteria and whether some or all of them are applicable to the present matter.

A further question is whether the Palestinian National Authority possesses sovereignty in the sense understood in international law. The sovereignty of the Palestinian people, historically, is traced back to the period of the Ottoman Empire and the mandate period under the League of Nations system. Some, relying on the fact that prior to 1948 certain capacities such as treaty-making and passport issuance were recognized for Palestine, have argued that Palestine’s statehood was recognized under the League of Nations Mandate System and the United Nations Partition Plan. By contrast, others contend that in the late decades of the nineteenth century there were competing claims regarding ownership of the territory of Palestine. Accordingly, in response to claims premised on recognition of sovereignty for Arab inhabitants, they note that the 1917 Balfour Declaration supported the establishment of a national home for the Jewish people and that this was incorporated into the mandate system; they further argue that the preliminary recognition of sovereignty for Class A mandate nations did not amount to formal and actual recognition of statehood by the League of Nations.

As a final point regarding state self-referrals, it should be stated that where a state itself refers a situation to the Prosecutor, the Prosecutor will be two steps ahead compared to a case in which the Prosecutor initiates an investigation proprio motu. First, there is no need to verify the factual reliability of the incoming information, and second, the investigation is not contingent upon authorization by the Pre-Trial Chamber; however, the Prosecutor can no longer decline to investigate on the basis of discretion, because conducting the investigation becomes a legal obligation.

Referral by the Security Council

The United Nations Security Council is one of the principal organs of the United Nations, established under Chapter VII of the UN Charter, and entrusted with the responsibility of maintaining international peace and security. Under the Charter, the Security Council has the authority to take various measures, including the deployment of peacekeeping forces, the imposition of international sanctions, and the authorization of the use of military force against hostile states (5). Decisions of the Security Council are issued in the form of Security Council resolutions, which require the affirmative vote of at least nine of its fifteen members, including the concurrence or absence of veto by its five permanent members.

With regard to the importance and characteristics of Chapter VII of the UN Charter, referrals made by the Security Council pursuant to Article 13(b) of the Rome Statute constitute measures adopted under Chapter VII authority. Such referrals occur only when the Security Council has determined the existence of a threat to international peace and security. These actions are undertaken to maintain or restore international peace and security in accordance with Article 39 of the Charter (3). The Security Council consists of five permanent members—the United States, the United Kingdom, Russia, France, and China—and ten non-permanent members elected for fixed terms. The five permanent members possess veto power over substantive decisions. Under Chapter VI of the Charter, the Council may examine any situation that may lead to international friction or give rise to disputes, and where a situation threatens international peace, it may take appropriate action, including referring matters to judicial mechanisms.

Under Chapter VII of the UN Charter, the Security Council possesses extensive authority to evaluate situations involving threats to peace, breaches of peace, or acts of aggression. In such circumstances, the Council's authority extends beyond recommendations and may include binding measures, such as the use of armed force to restore international peace and security. Examples include the United Nations' military intervention in Korea in 1950 and the deployment of multinational forces in Iraq and Kuwait in 1991. These powers demonstrate the Council's central role in enforcing international peace and security and ensuring compliance with international law (10).

The United Nations' role in maintaining international security is defined by the UN Charter, which grants the Security Council authority to undertake measures including investigating threats to international peace, recommending peaceful dispute resolution mechanisms, imposing economic sanctions such as embargoes and communication restrictions, and, where necessary, enforcing its decisions through military measures. The Security Council has also established mechanisms for mediation, peacekeeping, ceasefires, and fact-finding missions under UN supervision.

One of the Security Council's most significant powers in maintaining international peace and security under Chapter VII has been the establishment of international criminal tribunals. Pursuant to its Resolutions 808, 827, and 955, the Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). In these resolutions, the Council explicitly determined that the widespread violations of international humanitarian law and acts of mass violence in these regions constituted threats to international peace and security. Consequently, the establishment of these tribunals was viewed as a necessary measure to restore international order and prevent further violations (4).

A question arises, however, as to whether the Security Council, as a political body primarily responsible for maintaining peace and security, possesses the authority to establish judicial institutions whose purpose is the administration of international criminal justice. In response, it may be argued that the administration of justice is an essential component of sustainable peace. There exists a direct and inherent relationship between international criminal justice and the maintenance of international peace and security, as impunity for perpetrators of international crimes undermines the rule of law and contributes to instability. Thus, by facilitating accountability through international criminal mechanisms, the Security Council contributes directly to the restoration and preservation of international peace and security (7, 10).

The establishment of the ICTY and ICTR represented urgent responses to extraordinary circumstances involving grave international crimes. Furthermore, because these tribunals were established through binding Security Council resolutions under Chapter VII of the Charter, all UN member states were obligated to cooperate with them. This ensured the availability of enforcement mechanisms essential to the effective functioning of such tribunals. Additionally, the creation of international criminal tribunals through Security Council resolutions resolved the institutional relationship between such tribunals and the United Nations, since Article 29 of the UN Charter authorizes the Security Council to establish subsidiary organs necessary for the performance of its functions. Accordingly, these tribunals were considered subsidiary organs of the United Nations (4).

The existence of this institutional and procedural precedent in international criminal justice contributed significantly to debates concerning the independence of the International Criminal Court and its relationship with the Security Council during the Rome Conference. Two opposing viewpoints emerged during the negotiations. One perspective supported granting broad powers to the Security Council, including authority over determining the Court's jurisdiction. The opposing perspective rejected granting any such authority, emphasizing the need to preserve the Court's independence as a judicial institution separate from political influence. The final structure of the Rome Statute reflects a compromise between these positions, allowing Security Council referrals under Article 13(b), while maintaining the Court's institutional independence and judicial autonomy (6, 7).

Procedure for Referral by the Security Council

Despite extensive debate and institutional tensions, the International Criminal Court was ultimately established as an independent judicial institution, separate from the United Nations, and created by an international treaty rather than by a resolution of the United Nations Security Council. This structural independence, while essential to ensuring judicial neutrality and impartiality, could potentially create challenges for cooperation between the United Nations and the Court. Therefore, in order to avoid institutional fragmentation and to ensure that opposition by powerful states or permanent members of the Security Council would not render the Court ineffective, the Rome Statute was structured in a manner that preserves the Court's independence while simultaneously establishing a functional and cooperative relationship between the Court, the United Nations, and the Security Council (6, 7).

One manifestation of this institutional relationship is found in Article 2 of the Rome Statute, which provides that the President of the Court may conclude an agreement with the United Nations, subject to the approval of States Parties, to establish appropriate relations between the Court and the United Nations. In addition, the Statute explicitly addresses the relationship between the Security Council and the Court in other provisions. Article 13 and related provisions establish the Security Council's authority to refer situations to the Prosecutor for investigation and prosecution. Furthermore, under Article 16 of the Statute, if the Prosecutor has initiated an investigation or prosecution, and the Security Council adopts a resolution under Chapter VII of the UN Charter requesting deferral, the Court must suspend investigation or prosecution for a period of twelve months. This deferral may be renewed under the same conditions by subsequent Security Council resolutions. These provisions reflect a carefully balanced relationship, whereby judicial independence is preserved while acknowledging the Security Council's primary responsibility for maintaining international peace and security (3, 10).

With regard specifically to referrals by the Security Council, Article 13(b) of the Rome Statute provides that the Court may exercise jurisdiction when the Security Council, acting under Chapter VII of the UN Charter, refers to the Prosecutor a situation in which one or more crimes within the Court's jurisdiction appear to have been committed. The Statute does not impose additional procedural requirements or substantive conditions for such referrals beyond the requirement that the Security Council act under Chapter VII authority. This institutional arrangement enables the Security Council to utilize the permanent judicial mechanism of the ICC rather than creating ad hoc tribunals, thereby avoiding the delays, costs, and institutional limitations associated with establishing temporary international criminal tribunals. For this reason, the creation of the ICC has sometimes been characterized as an institutional advancement that provides the Security Council with a permanent judicial mechanism for enforcing international criminal accountability (4, 5).

Because the Security Council bears primary responsibility under the UN Charter for maintaining international peace and security, and because crimes within the Court's jurisdiction frequently arise in situations involving threats to peace, breaches of peace, or acts of aggression, referrals by the Security Council do not undermine the judicial independence of the Court. Rather, such referrals provide procedural access to the Court without dictating judicial outcomes. The decision to investigate or prosecute remains exclusively within the competence of the Court. This arrangement allows the Court to exercise jurisdiction even over crimes committed within the territory of non-party states, thereby enhancing its effectiveness and strengthening the international system of accountability, while simultaneously reducing the need for the Security Council to establish multiple ad hoc tribunals (6, 7).

Under the UN Charter, Security Council actions aimed at maintaining international peace and security must be implemented by UN member states, either individually or collectively, as determined by the Council. However, the principle of complementarity continues to apply fully even in situations referred by the Security Council. Articles 17 and 19 of the Rome Statute confirm that Security Council referrals do not confer special procedural advantages or exemptions with respect to admissibility requirements or jurisdictional challenges. States and accused persons retain the right to challenge the admissibility of cases and the Court's jurisdiction, and the Court must independently assess whether the complementarity criteria are satisfied. Thus, the Court's jurisdiction remains conditional upon the inability or unwillingness of national authorities to genuinely investigate or prosecute international crimes (6, 9).

Although the Security Council possesses binding authority over UN member states pursuant to Articles 25, 41, and 103 of the UN Charter, this authority applies primarily to states rather than to independent international judicial institutions such as the International Criminal Court. The procedural framework of the Court continues to operate unless specific provisions of the Rome Statute, such as Articles 13, 16, and 18, explicitly provide otherwise. For example, certain procedural notification requirements applicable to state referrals do not apply in the same manner to Security Council referrals. However, while the Security Council may impose obligations upon states to facilitate cooperation with the Court, it cannot alter the fundamental procedural and jurisdictional framework established by the Rome Statute (7, 10).

The informal expert group on complementarity in practice also examined whether the Security Council could require states to defer their jurisdiction in favor of the Court in specific situations referred under Chapter VII. Opinions within this expert group were divided. Some experts argued that such authority would be consistent with previous Security Council practice, particularly its establishment of the ICTY and ICTR, where the Security Council granted those tribunals primacy over national courts. Others argued that the Security Council lacks authority to compel states to refrain from exercising jurisdiction over crimes such as genocide, crimes against humanity, or war crimes, given that obligations to prosecute such crimes arise from peremptory norms of international law. These experts emphasized that granting such authority to the Security Council could disrupt the institutional balance between the Court and the Security Council established under the Rome Statute (4, 11).

Under this framework, the complementarity principle continues to function formally and substantively, and the accused retains the procedural right to challenge admissibility. However, in practice, such challenges may be less likely to succeed where the Security Council has referred the situation and where international cooperation mechanisms have been activated. Nevertheless, objections based on fundamental principles such as ne bis in idem, as recognized under Articles 17 and 20 of the Rome Statute, must always be respected, regardless of whether the referral originated from a state or from the Security Council.

What remains essential is that the Security Council's authority must not be interpreted excessively broadly. In particular, the Security Council must not be permitted to issue directives that would result in impunity by preventing investigation or prosecution entirely. However, measures designed to facilitate the Court's exercise of jurisdiction and to enhance cooperation with states are consistent with the objectives of the Rome Statute and the UN Charter. In exercising its authority, the Security Council must operate within the framework of the United Nations Charter and remain bound by its principles, including the promotion of international justice and accountability (6, 10).

Characteristics of Referrals by the Security Council

Referrals made by the Security Council to the Court possess distinctive characteristics that are not present in situations initiated through referrals by States Parties, declarations by non-party states, or investigations initiated proprio motu by the Prosecutor. In particular, in Security Council referrals, compliance with the Court's personal jurisdiction requirement is not necessary. Consequently, the Security Council may refer situations arising in non-party states where, in its assessment, one or more international crimes have been committed and where there is a risk that perpetrators may otherwise remain unpunished. This feature significantly enhances the Court's capacity to address impunity in situations involving non-party states, thereby strengthening the international system of criminal accountability (6, 7).

Article 11 of the Rome Statute emphasizes that the Security Council remains bound by the Court's subject-matter jurisdiction under Article 5 and by the temporal jurisdiction of the Court, meaning that only crimes committed after July 1, 2002—the date of entry into force of the Statute—may be referred. These limitations are rooted in fundamental principles of criminal law, including the principle of legality (nullum crimen sine lege) and the prohibition of retroactive criminal jurisdiction, which must be respected in all circumstances. However, the non-membership of a state does not grant immunity from the Court's jurisdiction; rather, it merely relieves that state of treaty-based obligations to cooperate with the Court, unless such cooperation is required pursuant to a Security Council resolution adopted under Chapter VII of the UN Charter (6, 10).

The proper and effective implementation of the complementarity principle in Security Council referrals, including determinations regarding admissibility and the appropriateness of prosecution, falls within the competence of the Prosecutor. The only procedural obstacles that may arise include requests for deferral by competent states, challenges to admissibility, and appeals against decisions not to prosecute. A significant difference between Security Council referrals and investigations initiated proprio motu is that in the former case, the Prosecutor is obligated to initiate an investigation and does not need to independently establish the reliability of the information received, unless he or she determines that there is no reasonable basis to proceed. In contrast, when acting proprio motu, the Prosecutor must first establish the existence of a reasonable basis before initiating an investigation (5, 9). Once a situation has been referred by the Security Council, the Prosecutor presumes the seriousness and reliability of the situation and proceeds accordingly, subject to admissibility requirements under the Statute.

Practical Jurisprudence of the Court: The Case of Omar al-Bashir

The Security Council's adoption of Resolution 1593, referring the situation in Darfur, Sudan, to the International Criminal Court, established an important precedent for Security Council-triggered jurisdiction. On March 31, 2005, the Security Council adopted Resolution 1593, referring the situation in Darfur to the Prosecutor of the ICC. The crisis in Darfur had begun in February 2003, when armed groups—including the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM)—launched attacks against government installations. These groups alleged that the Sudanese government, dominated by Arab elites, had systematically discriminated against and oppressed African populations. The Sudanese government responded with aerial bombardments and ground operations, including the mobilization of Arab militia forces known as the Janjaweed. These operations resulted in widespread violations of human rights and international humanitarian law, drawing significant international attention (3).

Initially, the Security Council responded to the Darfur crisis by adopting Resolution 1556, in which it determined that the situation constituted a threat to international peace and security. Subsequently, following reports by the UN Secretary-General indicating Sudan's failure to comply with Security Council demands, Resolution 1564 established an international commission of inquiry composed of five distinguished international experts to investigate the alleged crimes. This commission concluded that crimes against humanity had been committed in Darfur, thereby providing the basis for the Security Council's referral of the situation to the ICC (5, 10).

Following the referral, the Prosecutor conducted extensive investigations and ultimately secured arrest warrants against key individuals responsible for the crimes, including Ahmad Harun, then Sudan's Minister of State for the Interior, and Ali Kushayb, a leader of the Janjaweed militia. The Court requested cooperation from both States Parties and non-party states, including Sudan, Egypt, Eritrea, Ethiopia, and Libya, to arrest and surrender the accused. This marked a historic development in international criminal justice, as it represented the first instance in which an acting head of state—President Omar al-Bashir—became subject to an arrest warrant issued by the International Criminal Court (6, 7).

The Pre-Trial Chamber, which authorized the arrest warrant against al-Bashir, also notified the Assembly of States Parties and the United Nations Security Council whenever reports emerged indicating that al-Bashir intended to travel internationally, in order to facilitate enforcement of the arrest warrant. Such notifications were issued, for example, in connection with his planned visits to Kenya and Chad. These measures reflect the Court's reliance on international cooperation mechanisms to enforce its decisions, particularly in situations involving Security Council referrals.

An important legal question concerning Security Council referrals is whether admissibility requirements under the complementarity principle continue to apply. Some commentators have argued that admissibility procedures should not apply in Security Council referrals, on the basis that such referrals reflect universal jurisdiction principles and derive from the Security Council's authority under Chapter VII. They also point out that Article 18(1) does not explicitly refer to Security Council referrals, suggesting that admissibility procedures may not apply in the same manner.

However, Article 53 of the Rome Statute clearly requires the Prosecutor to conduct a preliminary examination of all available information before initiating an investigation, regardless of the source of referral. One of the key considerations under Article 53 is whether the case satisfies admissibility requirements under Article 17, including whether national authorities are genuinely willing and able to investigate and prosecute. Furthermore, if the Prosecutor decides not to proceed with an investigation, he or she must inform the referring entity—including the Security Council—and provide reasons for the decision. The referring entity may then request review of the Prosecutor's decision by the Pre-Trial Chamber (6, 9).

Accordingly, even in cases referred by the Security Council, the Prosecutor remains obligated to assess admissibility under Article 17 and related provisions. Only when admissibility criteria are satisfied may the Prosecutor proceed with a formal investigation. Practice confirms this interpretation. In the Darfur situation—the first Security Council referral to the ICC—the Prosecutor conducted a comprehensive assessment of complementarity and admissibility, including evaluating whether Sudanese authorities were genuinely willing and able to prosecute the crimes in question. The Prosecutor ultimately concluded that Sudan lacked genuine intent to conduct meaningful investigations, thereby satisfying the complementarity requirement and enabling the Court to exercise jurisdiction (5, 6).

Thus, the complementarity principle serves as the cornerstone of the Rome Statute, defining the relationship between national jurisdictions and the jurisdiction of the International Criminal Court. By incorporating complementarity, the Statute respects the primary role of national legal systems while simultaneously encouraging states to investigate and prosecute international crimes. States Parties are therefore required to establish effective domestic legal frameworks capable of prosecuting international crimes. This framework not only imposes obligations on states but also provides an opportunity for national legal systems to participate actively in the international criminal justice system. At the same time, states that conduct genuine domestic proceedings may prevent the surrender of their nationals to the Court, even in cases involving Security Council referrals, thereby reinforcing the balance between international accountability and national sovereignty (7, 9).

Conclusion

The principle of complementarity in the International Criminal Court constitutes one of the fundamental pillars ensuring the balance between national sovereignty and the obligation to enforce international criminal justice. A historical and practical examination of this principle demonstrates that the Court seeks to respect the rights of states and preserve their independence, intervening only in situations where there is clear evidence of inability or unwillingness on the part of national authorities to investigate and prosecute international crimes. This objective is achieved through detailed procedural regulations and supervisory mechanisms that enable the Court to perform an effective role in the administration of international justice.

Furthermore, referrals by states and the United Nations Security Council illustrate that the International Criminal Court, as an independent institution, relies on cooperation and interaction with states to fulfill its mandate. These referral mechanisms reinforce the institutional legitimacy of the Court and enhance its capacity to address serious international crimes. At the same time, they demonstrate that the Court does not operate in isolation but rather functions within a broader framework of international legal cooperation and accountability.

Despite the numerous advantages of the complementarity system, challenges remain, particularly with regard to coordination between the Court and national legal systems, as well as cooperation with international institutions. Differences in legal systems, political considerations, and varying levels of national judicial capacity may affect the effectiveness of complementarity in practice. These challenges highlight the importance of continued efforts to strengthen institutional cooperation and improve the procedural and operational efficiency of international criminal justice mechanisms.

Ultimately, strengthening national judicial systems and establishing effective legal frameworks for cooperation with the Court are essential prerequisites for the development and effectiveness of international criminal justice. Such cooperation not only contributes to preventing impunity but also enhances public confidence in international judicial institutions. By ensuring accountability for serious international crimes and reinforcing the rule of law at both national and international levels, the complementarity principle serves as a cornerstone of a more effective and credible global system of justice.

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